SUPREME COURT OF QUEENSLAND

CITATION:	*Fairmont Group Pty Ltd v Moreton Bay Regional Council* [2019] QCA 81
PARTIES:	**FAIRMONT GROUP PTY LTD** **ACN 138 546 871** (applicant) **v** **MORETON BAY REGIONAL COUNCIL** (respondent)
FILE NO/S:	Appeal No 5783 of 2018 P & E Appeal No 4816 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2018] QPELR 753 (Kefford DCJ)
DELIVERED ON:	10 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2018
JUDGES:	Gotterson and McMurdo JJA and Crow J
ORDERS:	**1. Grant leave to appeal.** **2. Dismiss the appeal with costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – CONSISTENCY OF PLANNING SCHEMES WITH OTHER LEGISLATION – where respondent refused application for approval to clear vegetation because of inconsistency with planning schemes – where applicant sought declarations from the Planning and Environment Court that no approval was required – where the primary judge held that the proposed clearing work is assessable development and therefore approval is required – where applicant argues that the *Planning Regulation* 2017 (Qld) applied instead of the planning scheme pursuant to s 34(4) of the *Planning Act* 2016 (Qld) – where applicant argues that the primary judge erred in categorising the proposed clearing works as assessable development – whether the *Planning Regulation* applied instead of the planning scheme – whether the primary judge erred in categorising the proposed clearing works as assessable development ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS

– QUEENSLAND – OTHER MATTERS – where respondent refused application for approval to clear vegetation because of inconsistency with planning schemes – where applicant sought declarations from the Planning and Environment Court that no approval was required – where the primary judge held that the proposed clearing work is assessable development and therefore approval is required – where applicant argues that the proposed work is accepted development and approval is not required – where applicant argues that the proper interpretation of s 20 of the *Planning Regulation* is to categorise exempt clearing work as accepted development – where respondent argues the proper interpretation of the *Planning Regulation* was to leave open the categorisation of exempt clearing work to the planning schemes – where respondent argues the planning schemes categorised the proposed clearing work as assessable development – whether exempt clearing work is categorised as assessable development and therefore approval is required

Planning Act 2016 (Qld), s 43, s 44
Planning and Environment Court Act 2016 (Qld), s 63
Planning Regulation 2017 (Qld), s 18, s 20, sch 7, sch 10

COUNSEL: S L Doyle QC, with H Stephanos, for the applicant
D R Gore QC, with J G Lyons, for the respondent

SOLICITORS: Cooper Grace Ward for the applicant
Colin Biggers & Paisley for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by McMurdo JA and with the reasons given by his Honour.

[2] **McMURDO JA:** The applicant company applied to the respondent Council, seeking approval to clear vegetation on its land at Morayfield. The Council refused to approve the works on the basis that it would be inconsistent with provisions of a relevant planning scheme, namely one or both of the Caboolture Shire Plan and the Moreton Bay Regional Planning Scheme 2016. The applicant appealed against that decision to the Planning and Environment Court.

[3] Before its appeal was heard, the applicant reconsidered its position. Rather than complaining that development approvals should have been given, the applicant claimed that no approval was required. So it applied to the Planning and Environment Court for declarations to that effect. The application was dismissed by Kefford DCJ, who held that approval was required by the terms of a planning scheme.[1]

[4] This is an application for leave to appeal against that judgment, under s 63 of the *Planning and Environment Court Act* 2016 (Qld). The alleged errors made by the judge involve questions of law. I would grant leave to appeal, but for the reasons that follow, dismiss the appeal.

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1 *Fairmont Group Pty Ltd v Moreton Bay Regional Council* [2018] QPELR 753; [2018] QPEC 20 ("Judgment").

[5] The critical question in this case involves the proper interpretation of provisions of the *Planning Regulation* 2017 (Qld) ("the Regulation"). But first it is necessary to explain the relevant provisions of the *Planning Act* 2016 (Qld) ("the Act").

The Act

[6] Section 44(1) of the Act provides that there are three categories of development, namely prohibited, assessable and accepted development. Prohibited development is development for which a development application may not be made.[2] Assessable development is development for which a development approval is required.[3] Accepted development is development for which a development approval is not required.[4]

[7] The applicant's case is that the proposed work is accepted development. The question in this appeal is whether the judge was correct to hold otherwise.

[8] Development may be categorised by what is called a categorising instrument,[5] which is relevantly defined by s 43(1) as follows:

> "A categorising instrument is a regulation or local categorising instrument that does any or all of the following—
>
> (a) categorises development as prohibited, assessable or accepted development; …"

A local categorising instrument includes a planning scheme.[6]

[9] The applicant says that the Regulation, as a categorising instrument, made work of this kind accepted development, a categorisation which could not be affected by a planning scheme. The Council says that the Regulation did not do so, leaving it open to the planning scheme to categorise the work, which it did by making it assessable development.

[10] The potential tension between the operation of a regulation and a planning scheme is addressed by the following subsections within s 43:

> "(4) A regulation made under subsection (1) applies instead of a local categorising instrument, to the extent of any inconsistency.
>
> (5) A local categorising instrument—
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> …
>
> (b) may not state that development is assessable development if a regulation prohibits the local categorising instrument from doing so; and
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> …
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> (6) To the extent a local categorising instrument does not comply with subsection (5), the instrument has no effect.

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2 s 44(2) of the Act.
3 s 44(3) of the Act.
4 s 44(4) of the Act.
5 s 44(5) of the Act.
6 s 43(3)(a) of the Act.

…

(8) Subsections (4) and (6) apply no matter when the regulation and local categorising instrument commenced in relation to each other."

[11] The applicant says that the purported categorisation, made within the planning scheme or schemes, of work of this kind as assessable development is of no effect, because it is inconsistent with its categorisation under the Regulation.

[12] The applicant argues that, by specifically excluding work of this kind from the categories of prohibited development and assessable development, the Regulation provides that the work is accepted development. In particular, it argues that, by the terms in which work of this kind is excluded from the category of assessable development, the Regulation has expressly provided that the work is accepted development. Alternatively, the applicant relies upon s 44(6)(a) of the Act, which provides that:

> "[I]f no categorising instrument categorises particular development—the development is accepted development".

[13] The respondent argues that the Regulation does not make the work assessable (or prohibited) development. And on its argument, nor does the Regulation make the work accepted development. In other words, the Regulation does not place this work in any category. It argues that the Regulation left open the potential for the work to be made assessable development by a planning scheme. In that way, it says, there is no inconsistency between the Regulation and the planning scheme or schemes by which a development approval was required in this case. Those arguments were accepted by the primary judge.

[14] It can be seen then that the case turns upon the proper interpretation of the Regulation.

The Regulation

[15] It is common ground that the proposed clearing of native vegetation on the applicant's land is "exempt clearing work" as defined in the Regulation.[7] That description might suggest that it requires no development approval, but that is not the case.

[16] Sections 18, 19 and 20 of the Regulation categorise development of various kinds as accepted development, prohibited development and assessable development respectively. They are as follows:

> "18 Accepted development—Act, s 44
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> For section 44(5) of the Act, development stated in schedule 7 is accepted development.
>
> 19 Prohibited development—Act, s 44

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7 Schedule 24 of the Regulation defines exempt clearing work to include clearing stated in schedule 21, part 2, which relevantly includes clearing vegetation on freehold land in a "category X area" (as this land is).

> For section 44(5) of the Act, development is prohibited development if it is stated in schedule 10 to be prohibited development.
>
> 20 Assessable development—Act, ss 44 and 45
>
> (1) For section 44(5) of the Act, development is assessable development if it—
>
> (a) is stated in schedule 9 or 10 to be assessable development; and
>
> (b) is not prohibited development under section 19. …"

[17] Importantly, it is not said in those sections that anything in schedule 10 categorises something as accepted development. Instead, these sections indicate that this could happen by s 18 and schedule 7 of the Regulation.

[18] Schedule 7, part 3, s 12 categorises (relevantly) the following as accepted development:

> "Operational work that is clearing native vegetation to which an accepted development vegetation clearing code applies if the work complies with the code."

[19] Notably, schedule 7 makes no reference to work that is the clearing of native vegetation which is "exempt clearing work" as defined.

[20] Schedule 10, part 3, division 1, s 4(1) categorises certain native vegetation clearing work as prohibited development. It provides that:

> "Operational work that is the clearing of native vegetation on prescribed land is prohibited development to the extent the work—
>
> (a) is not for a relevant purpose under the Vegetation Management Act, section 22A; and
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> (b) *is not exempt clearing work*; and
>
> (c) is not accepted development under schedule 7, part 3, section 12."
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> (Emphasis added.)

Since the work here is exempt clearing work, it is not within that description. This provision does not put exempt clearing work into a category; rather, it excludes it from the types of work which are categorised by the Regulation as prohibited development.

[21] Schedule 10, part 3, division 2, s 5 categorises certain work as assessable development. It provides that:

> "Operational work that is the clearing of native vegetation on prescribed land is assessable development, unless the clearing is—
>
> (a) *exempt clearing work*; or
>
> (b) accepted development under schedule 7, part 3, section 12."
>
> (Emphasis added.)

Again, this provision does not seem to put exempt clearing work into a category; rather, it excludes it from the types of work which are categorised by the Regulation as assessable development.

[22] As the primary judge noted,[8] it is common ground that exempt clearing work is neither categorised as prohibited development under s 19, nor categorised as assessable development under s 20 of the Regulation. The applicant argues that it is categorised as accepted development not by s 18, but by s 20 and the schedules to which it refers.

[23] I have set out above the terms of s 43(5)(b) of the Act, which provides that a planning scheme may not state that work is assessable development if a regulation prohibits the scheme from doing so. There is a provision of that kind in the Regulation. It is s 16 as follows:

> "For section 43(5)(b) of the Act, a local categorising instrument is prohibited from stating the development stated in schedule 6 is assessable development."

It is not suggested that the subject work is within the scope of schedule 6. Consequently, there is no provision within the Regulation of a kind described in s 43(5)(b) of the Act which applied to this work.

[24] I return to schedule 10, division 2, part 3, s 5 of the Regulation. The applicant says that, upon the proper interpretation of this provision, exempt clearing work has been categorised as accepted development. It is said that its effect is that the work will not be assessable development, either by force of the Regulation, or by a planning scheme. Like the primary judge, I am unable to accept that argument for the following reasons.

[25] The first reason is that the applicant's interpretation is difficult, at the least, to reconcile with the language of s 5, even before its context is considered. Section 5 does not say that exempt clearing work is accepted development; it says only that is not categorised as assessable development. It is a provision made under the power conferred by s 44(5) of the Act, which permits a categorising instrument (including a regulation) to categorise development but does not require an instrument to do so. Further, this provision also excludes "accepted development under schedule 7, part 3 section 12," whilst, notably, not similarly describing exempt clearing work as accepted development.

[26] Then there is the context of this provision. The structure of the Regulation, as a categorising instrument, is to categorise development (not necessarily all development) by the distinct areas of operation of ss 18, 19 and 20. The evident intent was that, where land is to be categorised as accepted development, that would occur by s 18, rather than by one or both of s 19 and s 20. Section 18 identifies the type of development which is intended to be categorised as accepted development, as development stated in schedule 7. Evidently, development outside the scope of schedule 7 was not intended, *by force of the Regulation*, to be made accepted development. Yet, on the applicant's argument, the intention was that some work would be made accepted development by the operation of s 18, and other work, namely exempt clearing work, would be made accepted development by the operation of s 20. In my view, that argument cannot be reconciled with the terms of s 20 or what I have described as the structure of the Regulation.

[27] Nor is there anything in the purpose of this legislation which supports the applicant's argument. The Act provides for the categorisation of development, according to a regulation or a local categorising instrument, with the former

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[8] Judgment [12].

prevailing in the event of an inconsistency. A proper role for a local authority, in the categorisation of development, is recognised and facilitated by the Act and the Regulation. A regulation, as a categorising instrument, should not be interpreted upon a presumption that it was intended to categorise every kind of development.

[28] The respondent's argument, which was upheld by the primary judge, should be accepted. The Regulation did not have to categorise each and every type of development, and it did not do so in the case of exempt clearing work. It left it open to another categorising instrument to do so, as occurred by the terms of the planning schemes. By that means, it became categorised as assessable development. Unless and until that happened, the work was to be treated as accepted development, not by force of the Regulation, but by force of s 44(6)(a) of the Act.

Orders

[29] I would order as follows:

1. Grant leave to appeal.

2. Dismiss the appeal with costs.

[30] **CROW J:** Fairmont Group Pty Ltd ("Fairmont") is the owner of freehold land at Morayfield. Fairmont wishes to clear vegetation on the land and submitted two development applications to the Moreton Bay Regional Council ("MBRC") on 28 January 2016 seeking developmental approval for the undertaking of operational work, being vegetation clearing.

[31] The applications concerned the clearing of native vegetation which fell within Category X of the Planning Regulation. Both applications identified the development as being code assessable. The development applications were ultimately refused on the basis of conflict with the *Caboolture Shire Plan* and the *Moreton Bay Regional Council Planning Scheme* 2016.

[32] Fairmont appealed against the refusal of each development to the Planning and Environment Court by appeals 2812 and 2813 of 2017. During the course of the preparation of the appeals, Fairmont reconsidered its position and concluded that development applications were not necessary and made an application to the Planning and Environment Court for a declaration that the clearing of "Category X on that freehold land did not require a development permit under the Planning Act".

[33] The parties to the application agreed:

(a) The proposed clearing, to the extent it involved native vegetation, was "exempt clearing work" as defined in the Regulation in that it was clearing stated in schedule 21 part 2.

(b) As exempt clearing work, the operational work was not a prohibited development within the meaning of s 19 and schedule 10, part 3, Division 1, Item 4 of the Regulation.

(c) The exempt clearing work was not an assessable development under s 20(1) and schedule 10, part 3, Division 2, Item 5 of the Regulation.

(d) That the *Moreton Bay Regional Council Planning Scheme* 2016 purports to categorise "clearing vegetation, not associated with a material change of use or reconfiguring a lot" as assessable development that requires code

assessment if it is not in the limited development zone and does not comply with the circumstances for accepted development.

[34] The application was heard and dismissed by the primary judge on 20 April 2018.

The Judgment at First Instance

[35] The primary judge accepted that all development may be categorised into three mutually exclusive categories; prohibited development, assessable development or accepted development.[9]

[36] The primary judge accepted that in the event there was no categorisation of a particular form of development, then the development was by default an accepted development within the meaning of s 44(6)(a) of the Act, the default provision.[10]

[37] The primary judge accepted that two types of instruments may categorise a development, namely a regulation, or a local categorising instrument such as a planning scheme, pursuant to s 43(1) of the Act.[11] The primary judge noted that although s 18 of the Regulation defined an accepted development as those stated in schedule 7 of the Regulation, it did not expressly define or state exempt clearing work as an accepted development.

[38] The primary judge also made reference to ss 19 and 20 of the Regulation which called in schedule 10, defining "prohibited development" and also "assessable development".[12]

[39] The primary judge accepted that exempt clearing work was "neither prohibited nor assessable development[13]" before the primary judge concluded "I do not accept that the *Planning Regulation 2017*, properly construed, is to be understood as categorising the development as accepted." The primary judge rejected Fairmont's submission.

[40] The primary judge, whilst accepting that the Act did provide for three mutually exclusive categories, and the exempt clearing work was neither a prohibited development nor an assessable development "it does not follow that the *Planning Regulation 2017* must therefore be understood as categorising exempt clearing work as accepted development".[14]

[41] With respect to the primary judge's conclusion that "it did not follow that the *Planning Regulation* 2017 must therefore be understood as categorising exempt clearing work as accepted development", Fairmont's primary argument is that it is not the Regulation, but rather the Act **and** the Regulation properly construed (or alternatively by reference to the inconsistency rule s 44(3)) which has that effect.

[42] The primary judge said:

> "Properly construed, the legislation contemplates that either the regulation or a local planning instrument may categorise development as assessable development. To the extent that the *Planning Regulation 2017* does not expressly categorise

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9 Judgment [22] and [33].
10 Judgment [22].
11 Judgment [23].
12 Judgment [24].
13 Judgment [32].
14 Judgment [33].

> development as prohibited development, assessable development or accepted development, and does not prohibit a local categorising instrument from categorising development as assessable development, the *Planning Regulation 2017* leaves the door open for a local categorising instrument to categorise development."[15]

[43] The primary judge adopted this interpretation of the legislative scheme of the Act and Regulation by construing the legislation "in the broader legislative context"[16], with reference to:

(a) Schedule 10, part 3, Item 5 of the Regulation "which contemplates that there is a difference between accepted development and exempt clearing work";

(b) Section 7(5) of the *Vegetation Management Act* 1999 (Qld) ('Vegetation Management Act') which states "this act does not prevent a local planning instrument under the Planning Act from imposing requirements on the clearing of vegetation in its local government area…";

(c) Schedule 8, Table 2, Item 1(b) of the Regulation "which contemplates that there may be circumstances where development is made assessable under a local categorising instrument, even though the development is the subject of specific consideration in a schedule to the *Planning Regulation 2017*".

Grounds of Appeal

[44] Fairmont submits that the primary judge erred in construing the Act and Regulation in failing to find that the exempt clearing works were accepted development (the construction error).

[45] Fairmont argues that the primary judge ought to have held that the Regulation applied instead of the Planning Scheme and pursuant to s 43(4) of the Act, the Regulation prevailed and the Planning Scheme was inconsistent (the inconsistency error).

[46] Fairmont further argues that as a result of either the construction error or the inconsistency error, the primary judge fell into error in categorising the clearing works as assessable development (the categorisation error).

[47] MBRC argues that the primary judge properly construed the Act and Regulation and was right to conclude that the Act and Regulation, particularly the failure to include exempt clearing work as an accepted development within schedule 6 did, as the primary judge concluded, leave the door open for the MBRC local categorising instrument (the *Moreton Bay Regional Council Planning Scheme* 2016) to categorise exempt clearing work as an assessable development.

Discussion

[48] Section 44 of the Act provides:

> "**44 Categories of development**

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15 Judgment [38].
16 Judgment [39].

(1) There are 3 categories of development, namely prohibited, assessable or accepted development.

(2) ***Prohibited development*** is development for which a development application may not be made.

(3) ***Assessable development*** is development for which a development approval is required.

(4) ***Accepted development*** is development for which a development approval is not required.

(5) A categorising instrument may categorise development.

(6) However—

(a) if no categorising instrument categorises particular development—the development is accepted development; and

(b) development in relation to infrastructure under a designation is—

(i) to the extent the development is building work under the Building Act—the category of development stated for the building work under a regulation; or

(ii) otherwise—accepted development.

(my underlining)

[49] Section 44 contains the important provision which states not only that there are three categories, but also contains the default position under s 44(6)(a) that where there is a failure of a categorising instrument to categorise a particular development, the development is an accepted development. Section 44 does not however define any development by reference to any express section or schedule of the Regulation, but rather the definitions are general; accepted development is "development for which developmental approval is not required".

[50] Section 43(1) of the Act defines a categorising instrument as a regulation or a local categorising instrument. Section 44(5) is important because it states that a categorising instrument (which may include a regulation) may, not must, categorise a development, and s 44(5) does not contain the adverb 'expressly'. Accordingly, the question is not "does a categorising instrument expressly categorise a development?" but rather "does a categorising instrument properly construed (as a whole) categorise a development?"

[51] In this regard, ss 18, 19 and 20 of the Regulation are important because they make reference to s 44(5) of the Act and they categorise some (but not all) developments by reference to Schedule 7, 9 and 10.

[52] Sections 18 and 19 of the Regulation provide as follows:

"**18 Accepted development—Act, s 44**

For section 44(5) of the Act, development stated in schedule 7 is accepted development.

> **19 Prohibited development—Act, s 44**
>
> For section 44(5) of the Act, development is prohibited development if it is stated in schedule 10 to be prohibited development."

[53] Section 18 of the Regulation in its terms does not purport to expressly define all types of accepted development. With respect to s 18 of the Regulation, it calls in schedule 7 as being included within accepted development and it includes in schedule 7, part 3, section 12, a category of accepted development as follows:

> "**12 Operational work for clearing native vegetation**
>
> Operational work that is clearing native vegetation to which an accepted development vegetation clearing code applies if the work complies with the code."

[54] It is to be noted that an accepted development vegetation clearing code is defined in the dictionary (schedule 24) by reference to the Vegetation Management Act (s 19O(1) and (2)). That is, it is quite clear that operational work that is the clearing of native vegetation is accepted if it complies with an accepted development vegetation clearing code. Clearing vegetation, which the State has regulated under the Vegetation Management Act, is not a matter for local councils.

[55] Section 19 of the Regulation includes in the definition of prohibited development those developments stated in schedule 10 to be prohibited. Whereas all development in schedule 7 is accepted development, schedule 10 includes both assessable and prohibited development. With respect to schedule 10, the relevant section is part 3, Section 4, which provides as follows:

> "**4 Prohibited development—clearing native vegetation other than for a relevant purpose**
>
> (1) Operational work that is the clearing of native vegetation on prescribed land is prohibited development to the extent the work—
>
> (a) is not for a relevant purpose under the Vegetation Management Act, section 22A; and
>
> (b) is not exempt clearing work; and
>
> (c) is not accepted development under schedule 7, part 3, section 12."

[56] It is important in construing s 4(1) to note the use of the conjunctive "and" in subsections (a), (b) and (c), the effect of which is that operational work (that is the clearing of native vegetation on prescribed land) will be categorised as a prohibited development only in limited circumstances where paragraphs 4(1)(a), (b) and (c) are satisfied.

[57] For present purposes, it is quite plain that exempt clearing work cannot fit into the category of prohibited development (hence the agreement of the parties recorded in Paragraph 4(b) of the reasons). Prior to considering s 20 of the Regulation, it is also important to have reference to schedule 21, which contains an extensive definition of exempt clearing work. Schedule 21 provides for numerous types of clearing

work of vegetation, which is the subject of the control of other types of State legislation. An example is the clearing of vegetation that is necessary prior to the construction of a road, e.g. s 5(a) of schedule 21.

[58] The fact that the extensive matters referred to in schedule 21 are defined as exempt clearing work by reference to requirements of other State legislation, indicates a statutory intention to remove from local councils the ability to place controls upon the clearing of native vegetation on the land the subject of schedule 21.

[59] What is made clear by section 4(1) of schedule 10 is that exempt clearing work is not a prohibited development. By section 44 of the Act exempt clearing work must be assessable or accepted. If there was no further regulation dealing with exempt clearing work then certainly the door would be left open for a local categorising instrument to categorise exempt clearing work assessable. The Legislature has, however, enacted s 20 of the Regulation and s 5 of schedule 10 of the Regulation.

[60] Section 20 of the Regulation provides:

> "**20 Assessable development—Act, ss 44 and 45**
>
> (1) For section 44(5) of the Act, development is assessable development if it—
>
> (a) is stated in schedule 9 or 10 to be assessable development; and
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> (b) is not prohibited development under section 19.
>
> (2) For section 45(2) of the Act, schedules 9 and 10 state the category of assessment required for assessable development stated in the schedules."
>
> (my underlining)

[61] Section 20(1) with its express reference to s 44(5) of the Act contained within the categorising instrument (being the Regulation) evinces a statutory intention that a development is properly considered to be an assessable development if it is stated in schedule 9 or 10 to be assessable development. One then looks to schedules 9 and 10 to see if the development (in this case "exempt clearing work") is "stated to be assessable development".

[62] Schedule 10 of the Regulation is a large schedule. It has a total of 21 parts and is titled "Developmental assessment". Each of the parts deal with different matters, for example, part 1 deals with airport land, part 2 deals with brothels, and relevantly in the present case, part 3 deals with the clearing of native vegetation.

[63] Section 5, part 3 of schedule 10 provides:

> "**5 Assessable development—clearing native vegetation on prescribed land**
>
> Operational work that is the clearing of native vegetation on prescribed land is assessable development, unless the clearing is—
>
> (a) exempt clearing work; or
>
> (b) accepted development under schedule 7, part 3, section 12."

(my underlining)

[64] Section 5, part 3 of schedule 10 categorises all operational work involving the clearing of native vegetation on prescribed land as assessable development, unless the clearing is exempt clearing work (or accepted development under schedule 7 part 3 Section 12). The plain words of s 5, in particular the word "unless" and the use of the disjunctive "or" compels the conclusion that "exempt clearing work" has been "stated in schedule 10" not to be "assessable" development within the meaning of s 20(1)(a) of the Regulation.

[65] As exempt clearing work is "stated" not to be assessable development pursuant to s 5(a) of part 3 of schedule 10 of the Regulation, then as the Regulation is a categorising instrument, the Regulation has categorised exempt clearing work as not capable of being assessable.

[66] Where by Regulation (Section 5(a) of part 3 of schedule 10) exempt clearing work is stated to be not an assessable development, then inconsistency arises if a local planning instrument does attempt to make that same exempt clearing work assessable. Section 43(4) of the Act resolves the inconsistency by rendering the local planning instrument inapplicable.

[67] A direct approach to construction is firstly to have reference to s 44(5) of the Act, which says that a categorising instrument may categorise the development into one of the three categories of prohibited, accepted, or assessable development. Reference can then be had to s 20(1) of the Regulation which directly engages s 44(5) of the Act and expressly says that development is assessable development if it is stated in schedule 10 to be assessable development. Schedule 10, part 3, section 5(a) is engaged, which expressly says that operational work that is the clearing of native vegetation on prescribed land is assessable development, unless the work is exempt clearing work.

[68] In the present case, it is accepted that the work is exempt clearing work and accordingly in terms of section 5, part 3 of schedule 10, the operational work is "stated" not to be assessable development.

[69] Whilst it is correct to say, as the respondent argues, that it would have been easier and plainer had the legislature included "exempt clearing work" within schedule 7 of the Regulation, the fact that it did not is not determinative.

[70] It is a long accepted tenet of statutory interpretation that a court construing a statutory provision must strive to give meaning to every word of the provision.[17] It is therefore necessary to strive to give meaning to every word of section 5, part 3 of schedule 10, i.e. to determine what work is done by section 5, part 3 of schedule 10.

[71] If section 5(b) of schedule 10 did not exist, it would be clear, in any event, that accepted development under schedule 7, part 3, section 12 is an accepted development (because it is in schedule 7).

[72] In this regard, it is proper to conclude that section 5(b) does no further work but rather confirms that which is made plain by section 18 of the Regulation and s 4(1)(c) of schedule 10 of the Regulation, namely, accepted development under schedule 7, part 3, Section 12 is not assessable development, because it is accepted

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17 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 per Gummow, Kirby and Hayne JJ.

development. The reference in s 5(b) of schedule 10 to an accepted development under schedule 7, part 3, section 12 is included for the purpose of clarity, just as section 1 of schedule 9 is included. For the purpose of clarity, it is helpful to set out section 1 of schedule 9, which is also entitled an 'assessable development' and also contains the word 'unless'. Section 1 of schedule 9 provides:

> "**5 Assessable development—building work under the Building Act**
>
> Building work under the Building Act is assessable development, unless the building work is accepted development under schedule 7."

[73] If section 5(a) of schedule 10 did not exist, then the situation would be that as exempt clearing work is not a prohibited development, pursuant to section 4(1)(b) of schedule 10 it would be capable of being either assessable or accepted development. That is, if s 5(a) of schedule 10 did not exist, then as the Regulation would not have classified exempt clearing work as accepted nor assessable, then the door would be left open for a local categorising instrument to categorise exempt clearing work as an assessable development. Section 5(a) of schedule 10 does, however, exist and the court must strive to give it meaning.

[74] The only logical meaning of section 5(a) and the only way in which section 5(a) can be given any effect is to construe it in terms of its ordinary natural meaning, namely exempt clearing work is not assessable development. That is, as it were, section 5 closes the door on a local categorising instrument from attempting to impose developmental conditions upon two species of work involving the clearing of native vegetation, being exempt clearing work and the schedule 7, part 3, section 12 accepted development work.

[75] A contrary interpretation concluding that the door is in fact left open for a local categorising instrument to categorise the clearing of native vegetation as assessable development where that work is exempt clearing work renders s 5(a) and the words "unless the clearing is exempt clearing work" superfluous.

[76] The practical outcome of the appellant's argument is likely when reference is had to the definition of exempt clearing work within schedule 21, that is, it would generally be expected that matters such as clearing for the purposes of the *Electricity Act* 1994 (Qld), the *Mineral Resources Act* 1989 (Qld), or the Vegetation Management Act are matters which are likely to be of state importance and ought to be regulated by state authorities and not subject to the further constraints of local authorities.

[77] With respect to the first of the three considerations referred to by the primary judge[18] recorded in paragraph [43](a) above, that there is a difference between an accepted development and exempt clearing work as set out in schedule 10, part 3, Item 5 of the Regulation, a number of observations can be made.

[78] Exempt clearing work is defined in schedule 24 of the Regulation as follows:-

> "***exempt clearing work*** means operational work that is the clearing of native vegetation—
>
> (a) on prescribed land, if the clearing is—

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18 Reasons [39].

(i) clearing, or for another activity or matter, stated in schedule 21, part 1; or

(ii) clearing stated in schedule 21, part 2 for the land; or

(b) that, under the Vegetation Management Act, section 74, is not affected by that Act."

[79] Schedule 21 of the Regulation entitled "Exempt Clearing Work" contains 12 pages of definitions of what constitutes exempt clearing work. It is not necessary to set them all out, it is sufficient to note that pursuant to schedule 21, part 2, s 2(d), clearing vegetation in freehold land that is Category X area is expressly defined to be exempt clearing work.

[80] Reference can then be had to the Regulation and the schedules in the Regulation in order to ascertain the intent of parliament. Section 16 of the Regulation calls in aid schedule 6 as stating (for the purpose of s 43(5)(b) of the *Act*) those types of developments that local categorising instruments are prohibited from classifying as "assessable development". By s 16(a) and s 16(b) of schedule 6, through the deployment of double and triple negatives in definitional terms, a local categorising instrument may make assessable the clearing of native vegetation, or weed or pest control involving clearing of native vegetation, or the conduct of an agricultural use in limited circumstances.

[81] In interpreting section 20 of the Regulation, it is necessary to have recourse to schedules 9 and 10. The pertinent part of schedule 9 is part 1, section 1, which provides that building work under the *Building Act* 1975 (Qld) is assessable development "unless the building work is accepted development under schedule 7".

[82] Schedule 10 of the Regulation is entitled "Development assessment" and makes reference to sections 19, 20, 22, 26, 27, 30, 31, 33 and 34. It may be observed that schedule 10 of the Regulation provides some 147 pages (which is a great deal of detail) as to what is an assessable development. Part 3 of schedule 10 is entitled "Clearing native vegetation". Section 4 of schedule 10 is set out in Paragraph [55] above.

[83] In interpreting the statutory scheme, it is necessary to have reference to the definition of a prohibited development pursuant to s 4(1) of the Regulation. The legislative intent is to prohibit the clearing of native vegetation on prescribed land unless it falls into one of the broad categories in subsection 4(1)(a), (b), or (c). In other words (stripping the section of its double negatives) the clearing of native vegetation for a relevant purpose under s 22A of the Vegetation Management Act or within the broad categories of exempt clearing work (as set out in schedule 21), or as an accepted development under schedule 7, part 3, section 12 is not prohibited development. Accordingly, there are many categories of clearing of native vegetation on prescribed land which is expressly defined as not being prohibited and accordingly must either be assessable or accepted forms of development.

[84] An important distinction between s 4(1) and s 5(1) of schedule 10, part 3 is the exclusion of the exception of clearing work for a relevant purpose under s 22A of the Vegetation Management Act. That is, putting ss 4 and 5 together, it can be gleaned that when the development is for a relevant purpose defined in s 22A of the Vegetation Management Act, for example for fodder harvesting, that operational work is acceptable as it is not prohibited under subsection 4 nor is it assessable under subsection 5.

[85] Whilst s 5(a) of schedule 10 states exempt clearing work is not an assessable development, section 5(b) of schedule 10 also identifies a form of development as "stated" to be not assessable which is any "accepted development" under schedule 7, part 3, section 12. Schedule 7, part 3, s 12 provides:

> "**12 Operational work for clearing native vegetation**
>
> Operational work that is clearing native vegetation to which an accepted development vegetation clearing code applies if the work complies with the code."

[86] It is to be recalled that schedule 7 is entitled "Accepted development" and that section 12 makes it plain that operational work that is the clearing of native vegetation that is subject to a vegetation clearing code (defined in schedule 24 with reference to its definition in the Vegetation Management Act) is an accepted development. That is, local governments cannot impose requirements or conditions above and beyond that imposed by the state in the vegetation clearing code the subject of the Vegetation Management Act.

[87] A common feature of ss 4 and 5 is the reference to exempt clearing work in ss 4(1)(b) and 5(a). Reading those sections together, with schedule 21, shows that in the broad category of exempt clearing work is defined not to be prohibited and nor pursuant to s 5(a) to be assessable. The legislative scheme set out in the Regulation is to allow local councils to make assessable the clearing of vegetation on prescribed lands, but only to a limited extent. That is, the intent of the Regulation is to repose in the state for most of the clearing of vegetation on prescribed land the ability to control the clearing activity and to leave to the local governments pursuant to local categorising instruments, only a very narrow ability to control clearing of vegetation. It is unsurprising, therefore, given the complexity of the subject matters the legislation attempts to regulate that the Act does contemplate a difference between "accepted development" and "exempt clearing work".

[88] The second reason referred to by the primary judge in support of her conclusion was s 7(5) of the Vegetation Management *Act*. With respect to s 7(5) of the Vegetation Management Act, it is difficult to see how this assists in the interpretation of the Planning Act or the Regulation. Section 7(5) of the Vegetation Management Act, enacted on 21 December 1999 (the original Act) provided:

> "This Act does not prevent a local planning instrument under the *Integrated Planning Act 1997* from imposing requirements on the clearing of vegetation in its local government area."

[89] Section 7(5) of the Vegetation Management Act remains in a similar form but with references to the Planning Act. Furthermore, in its current form, in the definition schedule to the Vegetation Management Act, accepted development is defined as "accepted development – see Planning Act s 44(4)" and assessable development is defined as "assessable development – see Planning Act s 44(3)".

[90] As the Vegetation Management Act calls in aid the definitions of accepted and assessable developments with references to ss 44(3) and 44(4) of the Planning Act, it is difficult to accept, as the primary judge did, that s 7(5) aids or reinforces a conclusion that a local categorising instrument can usurp the Regulation. That is, it is not feasible to attempt to construe the Act or Regulation by reference to s 7(5)

of the Vegetation Management Act as that act itself relies on the primary definitions in s 44 of the Planning Act.

[91] As to the third matter referred to by the primary judge[19] set out in paragraph [43](c) above, it is true that schedule 8, table 2, item 1(b) of the Regulation contemplates that there may be circumstances where development is made assessable under a local categorising instrument, even though the development is the subject of specific consideration in a schedule of the Regulation.

[92] Schedule 8, Table 2, Item 1(b) of the Regulation provides:

> "1. if Table 1 does not apply and the development application is for–
>
> […]
>
> (b) development, other than building work, completely in a single local government area and any of the following apply—
>
> (i) any part of the development is assessable development under a local categorising instrument or schedule 10, part 13, division 4, part 15 or 16;"

[93] Schedule 8 of the Regulation is the table which designates the assessment manager, pursuant to s 21 of the Regulation itself, being the regulation referred to in s 48(2) of the Act. The structure of the Act is to determine which of the three mutually exclusive categories an application falls into and if it is assessable development, s 48 of the Act engages s 21 of the Regulation, which engages schedule 8 and sets out the assessment manager, which, depending on the type of application, may be the Chief Executive, a private certifier, or the local government itself.

[94] Whilst a development may be assessable under a local categorising instrument by the local government, even though the development may be the subject of specific consideration in the schedule of the Regulation, it does not aid in the construction of the Act. Sections 47 and 48 of the Act deal with development applications and set out the assessment manager for a development application.

[95] There is little utility in looking at provisions dealing with the statutory allocation of the assessment manager, which can only occur if by definition, the development is assessable as opposed to accepted in determining whether a development is assessable or accepted. As explained in Paragraph [74] above, there remains vested in a local government an ability to create a local planning instrument concerning native vegetation, as long as it does not purport to regulate "exempt clearing work" or work to which schedule 7, part 3, section 12, applies.

[96] The scheme therefore is to afford primacy to the Act over the Regulation, and then over local categorising instruments. As a matter of construction, the conclusion of the primary judge is incorrect because the Regulation 'states' that exempt clearing work not to be an assessable development for the purposes of the Regulation. Accordingly, pursuant to s 44(4) of the Act, exempt clearing work is an accepted development.

[97] Exempt clearing work, which is by regulation made under s 43(1) of the *Act*, an acceptable development (by operation of schedule 10, part 3, Division 2, Item 5)

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19 Judgment [39].

cannot be re-categorised by a local categorising instrument as a matter of construction. If it were capable of doing so, it would certainly be inconsistent and thus not applicable under s 44(4) of the Act.

[98] For the above reasons I would:

1. Grant leave to appeal;
2. Uphold the appeal;
3. Set aside the decision of the primary judge for the Planning and Environment Court application; and
4. In lieu thereof, declare that a development permit for the carrying out of "exempt clearing work" being the operational works clearing of Category X vegetation on freehold land is not required under the Act.